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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B6

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 18 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Italian style sub sandwich shop. It seeks to employ the beneficiary permanently in the United States as a food services manager. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL), accompanied the petition.[1] Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on May 24, 2006.[3] The Immigrant Petition for Alien Worker (Form I-140) was filed on April 25, 2007.

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[1] On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA Form 9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[3] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

On the ETA Form 9089, the "job offer" position description for a support services manager provides:

> Will manage one or more restaurants. In this regard will hire, fire, discipline and oversee all personnel; train and orient personnel regarding management procedures; order, stock and maintain inventory; manage food costs and portion control; perform general accounting and financial analysis; market restaurant(s) through advertising, promotions and customer relations.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

H.4. Education: Minimum level required: Bachelor's degree.

4-B. Major Field Study: Hospitality Management.

6. Is experience in the job offered required for the job?

The petitioner checked "yes" to this question.

6-A If Yes, number of months experience required: 48

7. Is there an alternate field of study that is acceptable?

The petitioner checked "no" to this question.

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "no" to this question.

9. Is a foreign educational equivalent acceptable?

The petitioner listed "yes" that a foreign educational equivalent would be accepted.

10. Is experience in an alternate occupation acceptable?

The petitioner checked "yes" to this question.

10-A If Yes, number of months experience in alternate occupation required: 48.

10-B Identify the job title of the acceptable alternate occupation: Restaurant Manager.

14. Specific skills or other requirements: Four years progressively more responsible experience in restaurant management including marketing, budgeting, financial forecasting and accounting, quality control.

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As set forth above, the proffered position requires a Bachelor's degree in hospitality management. The terms of the labor certification also require four years of experience in the job offered or four years as a restaurant manager including the specific skills enumerated in Part H, Blank 14.

In support of the beneficiary's educational qualifications, the petitioner submitted the beneficiary's Advanced Diploma of Hospitality (Management) from the [redacted] and a transcript of classes taken by the beneficiary in pursuit of a Bachelor's of Commerce degree from [redacted] in India.[4]

In support of the beneficiary's education qualifications, the petitioner submitted a credential evaluation from [redacted] of the Trustforte Corporation. [redacted] concluded that the beneficiary has the "equivalent of" a four-year U.S. Bachelor of Arts degree in hospitality management based on the combination of the Bachelor's of Commerce degree and the Advanced Diploma of Hospitality.

[4] The record lacks a copy of his completed diploma although the transcript submitted from [redacted] indicates that the beneficiary "passed the Bachelor of Commerce (3 year degree course)."

The director denied the petition on June 12, 2007. He determined that the beneficiary did not hold a bachelor's degree in hospitality management or a foreign educational equivalent as of the time the petition was filed.

On appeal, with regard to the beneficiary's qualifying academic credentials, counsel stated that the director erred in finding that the petitioner required a single source degree or that the foreign educational "equivalent" allowed for by the labor certification would not include a combination of degrees such as the ones held by the beneficiary.

DOL assigned the code of 11-9051, Food Service Manager, to the proffered position. According to DOL's public online database at *http://online.onetcenter.org/link/summary/11-9051.00* (accessed February 4, 2010) and its description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Three requiring "medium preparation" for the occupation type closest to the proffered position.

According to DOL, one or two years of training involving both on-the-job experience and informal training with experienced workers are needed for Job Zone 3 occupations. DOL assigns a standard vocational preparation (SVP) range of 6-7 to Job Zone 3 occupations, which means "[m]ost occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree. Some may require a bachelor's degree." *See http://online.onetcenter.org/link/summary/11-9051.00.* Additionally, DOL states the following concerning the training and overall experience required for Job Zone 3 occupations:

> Previous work-related skill, knowledge, or experience is required for these occupations. For example, an electrician must have completed three or four years of apprenticeship or several years of vocational training, and often must have passed a licensing exam, in order to perform the job.

See id. Because of the requirements of the proffered position and DOL's standard occupational requirements, the proffered position is for a skilled worker, but might also be considered under the professional category.

Because the petition's proffered position qualifies for consideration under both the professional and skilled worker categories, the AAO will apply the regulatory requirements from both provisions to the facts of the case at hand, beginning with the professional category.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university

> record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

On August 13, 2009, the AAO issued a request for evidence to the petitioner. In this request, the AAO noted that there was no evidence in the record of proceeding that the beneficiary ever enrolled in classes beyond the academic studies at the [redacted]. The AAO also noted that the petitioner did not specify on the ETA Form 9089 that the minimum academic requirements of four years of college and a bachelor's degree might be met through a combination of lesser degrees and/or a quantifiable amount of work experience. The AAO further advised that according to the American Association of Collegiate Registrars and Admissions Officer's (AACRAO) EDGE database,[5] an Indian bachelor of commerce degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States. Additionally, the RFE advised that an Australian advanced diploma is awarded upon completion of one to three years of tertiary study, which is comparable to university study in the United States. EDGE also states that "the entry requirement varies but is usually completion of a Year 12 Certificate." EDGE additionally states that "the TAFE certificates are a vocational and training qualification and grants access to further vocational training or to some university programs which may grant transfer credit." Further, the labor certification application, as certified, did not demonstrate that the petitioner would accept a combination of degrees that are individually less than a single-source U.S. bachelor's degree or its foreign equivalent and/or a quantifiable amount of work experience when the labor market test was conducted.

At the outset, it is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

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[5] In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by the American Association of Collegiate Registrar and Admissions Officers to support its decision.

> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is left to USCIS to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[6] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> * * *
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).[7]

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[6] Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

[7] The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff,* 437 F. Supp. 2d 1174 (D. Or. 2005), which finds that United States Citizenship and Immigration Services (USCIS) "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church*, 437 F. Supp. 2d at 1179 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). The term "bachelor's degree" is understood to mean a "United States baccalaureate degree or a foreign equivalent degree" unless the petitioner states an equivalent on the Form ETA 750 and expresses the same in its advertisements for the job. As the petitioner failed to delineate any defined equivalency, as discussed *infra,* the common definition must be used and the *Shah* precedent applies.

> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Additionally, we note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Id.* at *11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Id.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at *17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated on the ETA Form 9089 and does not include alternatives to a four-year bachelor's degree in hospitality management. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at *7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id. See also Maramjaya v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008) (upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree). In this matter, the ETA Form 9089 does not specify an equivalency to the requirement of a Bachelor's degree in Hospitality Management.

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Moreover, for classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." (Emphasis added.) Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' narrow requirement of a "degree" for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate "degree" and be a member of the professions reveals that member of the profession must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential.

The information in the record on appeal indicates that the beneficiary received an Advanced Diploma of Hospitality (Management) on May 19, 2000 from the [redacted] and completed courses for his bachelor of commerce degree at Osmania University. The credential evaluations from [redacted] states that the beneficiary holds the equivalent of a bachelor's degree based on the combination of these two programs of study and the beneficiary's two years of study at [redacted]. The record does not demonstrate that the beneficiary has one four-year, single-source Bachelor's degree in hospitality management as required by the terms of the labor certification, or that either program of study standing alone would be the equivalent of a four-year single-source bachelor's degree.

The ETA Form 9089 does not provide that the minimum academic requirements of a Bachelor's degree in hospitality management might be met through anything else less than a single-source, four-year bachelor's degree or a foreign equivalent degree. The recruitment materials provided in response to the AAO's Request for Evidence ("RFE"), issued by this office on August 13, 2009, were placed on the Louisiana Department of Labor website, with a local radio station, and with *The Shreveport Times*. The petitioner also submitted a letter from [redacted] Vice President of Placement Services USA, which stated that it assisted the petitioner in recruitment, but that it was unable to find qualified applicants for the position. The advertisement placed with *The Shreveport Times* and on the radio stated that a "Bachelor's, Hospitality Management; four years progressively more responsible experience ..." was required. The job posting provided at the petitioner's place of employment also stated that a bachelor's degree in hospitality management is required. These advertisements apprize U.S. worker applicants that the minimum requirement for the position is a bachelor's degree and that only those who hold a bachelor's degree would be qualified for the position. The job order posted for the position with the Louisiana Department of Labor stated that the required education was a "Bachelor of Hospitality Management" plus four years of experience in

the text and elsewhere, a "Bachelor's Degree or Equivalent" plus four years of experience.[8] The labor certification, however, specifically states that only a bachelor's degree is acceptable, with no allowed alternatives or defined equivalencies. USCIS must read the labor certification as certified. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).[9]

The petitioner also submitted seven of the eight resumes which it represented to be the only responses received in response to its advertisements. In an affidavit, [redacted] president and owner of the petitioner, represented that five of these applicants did not have the requisite level of education. His affidavit specifically states, "the position requires a Bachelor's degree in Hospitality Management or *its foreign equivalent*[10] and four (4) years of experience." [Emphasis added]. He further states that five applicants, "were not qualified for the position because they *did not possess the required Bachelor's degree or its foreign equivalent.*" [Emphasis added]. Additionally, regarding the remaining applicants, "three (3) applicants did possess the minimum qualifications for the position . . . we sent letters . . . via certified mail requiring evidence of their Bachelor's degrees and four (4) years of experience . . . none of these three (3) applicants responded."[11] The affidavit from [redacted] did not identify which candidates were qualified

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[8] The job order also stated the following hiring requirements: drug testing/screening, background checks, reference checks, and experience on the job. These requirements are not stated on the labor certification or in any of the other advertisements, and, therefore, do not accurately reflect the terms of the certified labor certification.

[9] The DOL has provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the ETA 750, Part A as well as throughout all phase of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." *See* Memo. from [redacted], Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [U.S. Citizenship and Immigration Services (USCIS)] to accept the employer's definition" and SESAs should "request the employer provide the specifics of what is meant when the word 'equivalent' is used." *See* Ltr. From [redacted], Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to [redacted] Esq., Jackson & Hertogs (March 9, 1993). DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From [redacted], Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

[10] *See Maramjaya v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008) (upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree). Similarly, USCIS interprets "foreign equivalent" to mean a single source four-year degree.

[11] This affidavit contradicts the "employer's report" submitted on August 2, 2006 and also signed by [redacted] That report states that the petitioner "received eight (8) applications for the position of Food Service Manager. They were all eliminated because they did not qualify for the

for the position. Counsel's RFE response discusses six of the eight applicants. Counsel states that the petitioner considered three applicants where the Bachelor's degree field of study was "substantially similar." Three applicants were disqualified "as they did not possess a bachelor's degree or its foreign educational equivalent." Neither counsel or the petitioner's president discuss the other two resumes. From a review of the two resumes not discussed, one candidate had over thirty years of experience in the restaurant business, including extensive management. The second resume exhibited over twenty years of experience and that the candidate completed extensive related training courses. Despite the claim to have considered those with the "foreign equivalent" of a degree, it is unclear on what basis the petitioner determined what was the equivalent. Further, the petitioner failed to adequately state and advertise to the public what it would consider to be the "equivalent" of a bachelor's degree. Based on the owner's affidavit, by his own sworn statement, the petitioner specifically considered only candidates with a "Bachelor's degree or its foreign equivalent." The affidavit does not mention consideration of candidates with the "equivalent" of a bachelor's degree based on a combination of diplomas or combination of education and experience, or based on extensive experience alone that might equate to a bachelor's degree in the required field. The beneficiary does not have a four-year single source bachelor's degree or foreign equivalent degree in the required field of study, but instead has the "equivalent" based on a combination of educational programs.

Counsel argues that the petitioner's intent to accept a combination of degrees is evidenced by the inclusion of the beneficiary's education on part J of the ETA Form 9089. Although the ETA Form 9089 contained information about the beneficiary's education, the issue is not whether the petitioner intended to accept the beneficiary's education, but whether the beneficiary met the stated requirements of the position. The beneficiary checked that he had a "bachelor's" degree in part J.11 and that he completed this education at the [redacted], Australia in 2000. As noted above, that vocational or training education may be considered for undergraduate credit on a course-by-course basis (for a transfer student), however, it is not a four-year, single-source bachelor's degree as required by the terms of the labor certification. The issues are instead whether the petition allowed for any equivalency on ETA Form 9089 and whether this intent was communicated to potential applicants for the position.[12]

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position." "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

[12] On appeal, counsel cites the case of *Syscorp International,* 1989 INA 212 (BALCA Apr. 1, 1991), for the proposition that when the phrase "or equivalent" is used, greater leeway should be given to the petitioner's ability to use a combination of degrees or education and experience. As counsel notes, this decision is not binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). In addition, *Syscorp* concerns an H-

The beneficiary does not have a United States baccalaureate degree or four-year, single-source foreign equivalent degree and, thus, does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act.

The regulation at 8 C.F.R. 204(5)(l)(3)(ii)(B) states the following:

> If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The above regulation requires that the alien meet the requirements of the labor certification.

Even if the petition qualified for skilled worker consideration, the beneficiary does not meet the terms of the labor certification, and the petition would be denied on that basis as well. The labor certification requires that the individual have a single-source, four-year bachelor's degree in hospitality management. The petitioner did not state, require, or allow the candidate to meet the terms of the labor certification based on any defined equivalency. The beneficiary does not have a four-year, single-source bachelor's degree and therefore does not qualify for the position in the labor certification as certified. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B) (requiring evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification). As a result, the beneficiary cannot be classified as a "skilled worker" under the terms of this labor certification.

Based on the foregoing, the petitioner failed to establish that the beneficiary had the education required by the certified labor certification to meet the terms of the position offered.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

1B petition, which allows for an equivalence of experience for education that is not accepted in immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). Further, the petitioner did not state "or equivalent" on its ETA Form 9089.